Filed
Dec. 6, 1972
By Elaine E. McGhee, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

UNITED STATES OF AMERICA ex rel HENRY F. COBELL,) Civil No. 3123

Petitioner,)

-vs-) MEMORANDUM OPINION AND

JOAN R. COBELL and THE HONORABLE JUDGE JOHN SHARP and THE BLACKFEET TRIBAL COURT, and LEONA CONWAY,) ORDER

Respondents.

Petitioner has applied to this court for a writ of habeas corpus which would require the release of his two minor children, Rodney Dale Cobell and Venetta Lynn Cobell, from the custody of the Blackfeet

Tribal Court of the Honorable Judge John Sharp established by an order of that court dated the 6th day of October, 1972. Petitioner alleges that the order of the Tribal Court was made without jurisdiction and therefore is illegal and subject to attack by a writ of habeas corpus.

JURISDICTION OF THIS COURT

This court finds that it has jurisdiction pursuant to the provisions of 25 U.S.C. § 1303, which provides:

> "The privilege of writ of habeas corpus shall be available to any person, in a court of the United States to test the legality of his detention by order of an Indian tribe."

The clarity of the grant of jurisdiction contained in that section is beyond cavil

RIGHT OF THE PETITIONER TO CONTEST THE CUSTODY OF HIS CHILDREN

Before this court may inquire into the legality of the order, it must

be clear that the petitioner satisfies the prerequisites of the writ. Ordinarily, all that is necessary is that a petitioner for a writ exhaust all remedies available to him in the jurisdiction whose assertion of custody he attacks. Here, there is an additional question: That is, the right of this petitioner to contest the custody of one other than himself.

That there is non-identity of the petitioner with the person subject to the allegedly unlawful custody presents no obstacle to decision. The father of minor children, where he is the custodial parent, necessarily has standing to question the detention of his children.

Habeas corpus is an extraordinary writ which, at the discretion of a Federal Judge, should issue only in the most extraordinary circumstances. I find such

circumstances here. I do not read the order of the Tribal Court as inviting the petitioner to appear in that court to seek custody of these children. On the contrary, although the order is, by expression, temporary, it is conditioned upon the satisfaction of the Tribal Court with the order of the Montana State District Court concerning the custody of the children, and then only if the Tribal Court finds those arrangements acceptable and in the best interests of the children. Though the order may be "temporary", it is not conditional upon the activities of this petitioner. He is without further remedy before the Tribal Court.

Ten days prior to the issuance of the order by the Tribal Court, the District Court for the Eighth Judicial District of the State of Montana had issued an order

granting the custody and control of the said minor children to the petitioner, Henry F. Cobell. A custody order is, by its nature, never technically final and, since the circumstances of the custodial or other parent may change, it is necessarily subject to the continuing jurisdiction of the court which issued it and the concurrent jurisdiction of any other court of competent jurisdiction before whom the minor children might appear with the parent.

This discussion leads to but one end: 1) That the Tribal Court asserted jurisdiction over these children and, by the expression of the Honorable Judge Sharp before this court, that court considered the assertion of jurisdiction to be final and uncontestable; and 2) that the petitioner had utilized every remedy

available to him in the judicial system of the State of Montana.

LEGALITY OF THE ORDER OF THE TRIBAL COURT

Having decided that this court has jurisdiction to hear the petitioner's claim, and that the petitioner has the right to bring his claim, all that remain to be decided are its relative merits.

The scope of review that this court may undertake under 25 U.S.C. § 1303 is limited to a determination of the legality of the order issued by the Honorable Judge Sharp. I find that order to be improper, not because of its express purpose, but rather because of its tenor, a distinction of some import.[1]

---

[1]Although the order purports to be issued to protect the well-being of the minor children in question, its tenor and the circumstances surrounding its

The effect of the order is to allow a Tribal Court to establish a sanctuary for Indian persons, both members and non-members, who have subjected themselves to state court jurisdiction, merely because the Indian person takes flight to the Indian reservation. I find that to be an

---

issuance bespeak another effect. The order recites, in apparent reference to the jurisdictional provision of the Blackfeet Law and Order Code, that the children had resided within the territorial limits of the reservation, that they were without sufficient and adequate supervision, and that they were suffering emotionally and psychologically because of the uncertainty of their custodial and adult supervision. As explained in footnote 2, I do not reach the question of the extent of the Tribal Court's jurisdiction under the section relied upon. And, although the predicates of the order may be doubtful in view of the circumstances, the court does not rest its decision upon the validity of the factual findings pursuant to which the order was made.

an exercise of Tribal power beyond that granted in any controlling Act of Congress.[2]

The order recites: That the children subject to the order are not to be removed from the reservation without the permission of the court; that they are under the custody of the Tribal Court; and, in effect, that the order will be in effect until the Tribal Court is satisfied with a determination by the

---

[2]The Blackfeet Tribal Constitution grants Tribal Court jurisdiction over Tribal members. Art. VI, § 1(k), Const. of the Blackfeet Tribe. This opinion leaves open the question of the validity and effective scope of the declarations, delegations and disclaimers made pursuant to the above section in Chap. 2, §1, and Chap. 3, §§ 1, 2 and 6C of the Blackfeet Law and Order Code, 1967. It should be noted in passing that the court recognizes that there are doubts in many minds about their validity in view of the Kennerly decision; however, it is presently both inappropriate and unnecessary to reach

Montana District Court regarding the custody of the children.

Here, the parents, and consequently the children, had submitted themselves to the jurisdiction of the Montana District Court, not only at the time of the divorce but also when they sought modification of the custody portion of the divorce decree. Neither the order in question nor any of the parties contest the power of the Montana courts in this regard. My research reveals no impediments to state court divorce and custody jurisdiction over Indian persons, be they Tribal members or not, who, otherwise qualifying, personally invoke that jurisdiction.

---

those questions. Kennerly v. District of Montana, 400 U.S. 423 (1971).

Shortly after the invocation of that jurisdiction, the Tribal Court entertained and granted a petition collaterally attacking the state court's judgment, though not its jurisdiction. I find the Tribal Court's conduct to be improper in three connections.

First, even assuming concurrent Tribal Court power to modify state court custody decrees, the order in question fails to even purport such a purpose. It does not reflect that it is initiated because of a change in parental condition justifying a modification. Ten days before its issuance, an order of the state court which retained continuing jurisdiction of this matter denied, in effect, a petition for modification. While I cannot and do not hold that the Tribal Court is bound by the full faith and credit clause

of the Federal Constitution, I entertain no doubt as to the applicability of the doctrine of comity.

Second, the petition was granted following an ex parte plea by the grandmother of the children. That proceeding substantially failed to accord requisite due process. The Tribal Court is commanded by 25 U.S.C. § 1302(8) not to deprive persons before it of liberty or property without due process of law. I perceive no meritorious argument to the present applicability of that section. The order results from an ex parte petition granted in circumstances where the real party in interest, the petitioner herein, was not notified nor given an opportunity to appear. The order is therefore invalid as the product of a judicial act substantially violative of

the concept of due process.

Third, and most important, the order is an invalid exercise of power by the Tribal Court. Assuming, arguendo, that the provisions of the Law and Order Code under which the Tribal Court acted are properly promulgated, and that, therefore, the Tribal Court has power to act in similar circumstances, the order is nonetheless an improper exercise, for no governing Act of Congress contemplated the establishment of a shield of immunity for Tribal members of other Indian persons against the powers of this or any sovereign state of the Union where such individual has either consented to or invoked the jurisdiction of the state. The orderly administration of justice cannot tolerate escape from sanctions of the law, duly evolved, merely because the individual

against whom they are levied enjoys the status of "Indian person." An Indian person properly before a state tribunal of competent jurisdiction cannot avoid the result of the exercise of that jurisdiction by flight to a reservation.

Nor is such individual clothed with immunity by an act of the Tribal organization, be it through the Tribal Court or Council, for, again, no Act of Congress contemplates the exercise of Tribal power, either expressed or implied to isolate the reservation from due process of the law by establishing an island of amnesty within the territory of the state, flight to which will shield an Indian person from the operation of the law.

It is indeed a narrow context to which the court here addresses itself.

I speak only of the absence of Congressional expression on the subject of Tribal government powers to shield Indian persons from the proper operation of the law where a state court's jurisdiction has been invoked by such person. Congress no more contemplated escape by an Indian person from the effect of the divorce and custody decree by flight to the reservation than it contemplated an escape from criminal sanctions by an Indian person who commits an offense off the reservation by flight to the reservation for sanctuary.

Thus, even assuming some power to act, the pruported exercise of power to protect the minor children here constitutes an invalid and improper act by an Indian Tribe.

IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus

directing the return of the minor children of the petitioner, the custodial parent under order of the District Court of the State of Montana, is granted.

Done and dated this 6th day of December, 1972.

JAMES F. BATTIN
United States District
Judge